California Law Review

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Introductory Note

Many years ago that great lawyer and thinker, James Bradley Thayer, prophesied that the law in the United States would tend more and more to divide itself into three great branches or streams, represented roughly by the Atlantic States, the Mississippi Valley States, and the Pacific States. The chief trouble with great thinkers, John Bright once said, is that they usually think wrong. But so far at least as his prophecy concerns the Pacific States, there is evidence that time is proving the truth of Professor Thayer's utterance.

The most casual student must often be impressed with the wide divergence between the statutory and common law of these States and the statutory and common law of, say, the New England States. Take, for

example, such a fundamental matter as the right of self-defense,—the duty of one assaulted to withdraw from the combat or "flee to the wall,"—and compare the views of New England courts with those of the California court. The whole theory of the relation of the individual to society is seen, in the two cases, to be different. The western court rejects the established doctrine of the common law that the assaulted party must use all available means to withdraw from the quarrel rather than take the aggressor's life, and permits the offended party to stand his ground. The judges recognize the standards of conduct, which, whether right or wrong, actually control the people of the State, rather than those laid down by Matthew Hale or Sir Edward Coke, or even those which might, perhaps, be dictated by a higher morality. Popular standards of conduct are by these decisions embodied in the form of law. What previously existed vaguely in the customs and ideas of the people is merely expressed in definite rule.

In less fundamental matters than this of the right of self-defense, involving as it does the relation between the society and the individual, the difference between the legal system of California and that of Massachusetts,—to continue the comparison with the New England States,—are manifold. The doctrines in regard to the property rights of husband and wife, in regard to rights in running waters, in regard to the law of mines, in regard to the powers of equity in granting specific performance, to name a few instances, present striking contrasts in the two jurisdictions. What a marked difference in the connotation of the word "property" between a community where the owner of cattle must keep them at his peril from committing trespasses, and one where, as in California, in the absence of special statutes to the contrary, the farmer bears the risk of the trespasses of his neighbor's cattle!

To multiply instances of such differences might prove interesting and perhaps profitable, and would go far, we have no doubt, to fortify Justice Holme's dictum that the life of the law is not logic but experience. But those cited will sufficiently call attention to the fact that extensive variations in some very vital matters do exist, and also serve in part as an excuse for the publication of the California Law Review. The other part of the excuse for its publication exists in the fact that the peculiar doctrines of California have colored the jurisprudence of all the Rocky Mountain States. This was but what might have been expected. In mere volume, the California decisions and legislation exceed, it is safe to assert, the combined decisions and legislation of all the other States belonging to this group. One would naturally expect, therefore, that such decisions would be cited in the neighboring states with at least as much frequency as those of the Massachusetts Court are cited in the other New England States. Even if there had not been among the people of these States, unity of idals, of institutions, of traditions, of inheritance, of social and economic needs, the mere accident of the volume of California law would have suggested the possibility of some similarity among the legal doctrines of these States. But when these other, more subtle and more impor-

tant, matters are taken into the account, the development of a Western type of jurisprudence is felt to have been almost inevitable.

Hitherto, (save for the brief period during which the West Coast Reporter was published during the early 80's), this system of law has had no voice for its expression save in the actual reports of cases and the volumes of the statutes. But the life of the law is certainly larger than the sum of law reports and statutes. It seems proper that some periodical should exist by means of which those who are engaged in the processes of law-making, whether as lawyers, or judges, or legislators, or writers, or teachers, may express themselves more freely or more extensively than they otherwise might do; some medium through which exchange of thought in regard to legal problems of local importance might be effected; some publication which should serve to record the history and development of our law. In a very modest way, it is the purpose of this Review to serve these wants. It is not expected that the Review will occupy a place by the side of the great national reviews of this country and of Europe, but it is hoped, that it may, in a slight degree, meet the needs of a constructive criticism of the legal problems presented in California and the other Pacific Coast States. It is its aim to approach these problems in a practical spirit. Aside from its purpose to afford an expression in legal matters to the critical and historical needs of the communities represented, the Review has no platform or thesis to maintain. Discussions of legal questions from all points of view will be welcomed.

The Review is published bi-monthly (six times during the year), by the faculty and students of the department of Jurisprudence of the University of California at Berkeley. The greater part of the credit for the publication of the first number and the establishment of the Review belongs to students. Without their earnest and enthusiastic efforts both in the editorial and business departments, and without their energy and devotion as a student body, the plan of publishing this Review would never have borne fruition. In particular, thanks are due to Mr. Warren H. Pillsbury, now of Cambridge, Mass., for his untiring and unselfish interest and efforts in the business of the Review.

O. K. M.

EDITORIAL NOTES

THE PROPOSED CHARTER OF LOS ANGELES COUNTY.

Los Angeles county is the first county in the State to take advantage of the opportunity of the measure of home rule offered by Section 7½ which was added to Article XI of the Constitution in October, 1911. A board of freeholders was elected under the provisions of that section and has prepared a county charter, which will be voted on at the election on November 5.